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No. 86-1219

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court Of The United States

October Term, 1986

JOHN H. LARY, JR.,

Petitioner,

v.

THE REPUBLIC OF CHINA,
a foreign government,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh circuit

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REPLY BRIEF

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REASONS WHY THE PETITION SHOULD BE GRANTED

I. Constitutional and statutory law are in a state of confusion.

The meaning of Article III, Section 2, paragraph 1 of the Constitution of the United States, as well as its relationship to the Foreign Sovereign Immunities Act

of 1976, is in a state of confusion because of conflicting decisions in the inferior courts of the United States and because the decision in this case conflicts with decisions of the Supreme Court. This Constitutional issue, as well as the Constitutional issues of the limits of Executive Power and the Seperation of Powers, the Eminent Domain Clause, and the Due Process requirements are raised here, just as they were raised before the Court of Appeals. An important issue of statutory interpretation, the proper application of the statutory grant of jurisdiction conferred by the F.S.I.A.,was decided wrongly and in conflict with decisions of this Court.

II. Petitioner has never litigated the issue of Article III. Section 2 of the Constitution in any other case, and is not precluded from litigating those other issues that he has argued in another case.

Respondent argues that Petitioner, as a member of the certified class of plaintiffs in **Jackson v. P.R.C.**, 794 F.2d 1490, cert. denied, has already argued and lost the issues contained in Sections I, II, and V of Petitioner's Reasons for Granting Review because the Court of Appeals did not reverse in **Jackson v. P.R.C.** That argument is both bad fact and bad law.

In the case of **Jackson v. P.R.C.**, the question of the meaning of Article III, Section 2 of the Constitution was never raised. In this case, Petitioner raised that question before the Eleventh Circuit and raises it here. True, there is overlap betwen the arguments advanced in **Jackson v. P.R.C.** in support of the proper interpretation of the grant of jurisdiction given by the F.S.I.A. and those presented here, but no overlap with respect to any Constitutional question (**Jackson v. P.R.C.** did not raise any Constitutional questions).

At any rate, *starre decises* does not preclude Petitioner from "proceeding in this case." *Stare decises*, when it binds, binds only a court of equal or lower rank; an appellate court decision cannot bind

the Supreme Court. Note that the precedent established by **Jackson v. P.R.C.** is of short duration, parties have not relied upon it and acted in such a way as to accrue rights under it, and the precedent needs to be overruled to vindicate plain, obvious principles of law and to remedy continued injustice. Under these circumstances, to overrule **Jackson v. P.R.C.** is within the descretion of even a lower court.

Respondent suggests that Petitioner should be collaterally estopped from proceeding here with his arguments that the F.S.I.A. should apply "retroactively" with respect to the Hukuang bonds because he unsuccessfully argued that point in **Jackson v. P.R.C.** Even if the Court agrees, there should be no estoppel with respect to the other bonds that are at issue in this suit, bonds that were not part of **Jackson v. P.R.C.**

To estop Petitioner from proceeding with the statutory argument with respect to the Hukuang bonds would lead to the rather schizophrenic situation in which this Court would consider all of Petitioner's arguments with for all bond issues other than the Hukuang bonds and only some of Petitioner's arguments for the Hukuang bonds. Such a result would require this Court to consider Petitioner's Constitutional arguments for the Hukuang bonds, even if the Court reversed and remanded for the other bonds on statutory grounds alone. Since it is the long standing policy of the Supreme Court to decide, if possible, only a statutory issue and leave aside all Constitutional issues in any case before it, the Court should not split its deliberations and thereby require a consideration of Constitutional questions. In precluding a party from relitigating an issue, "...court must be satisfied....that application of *res judicata* or collateral estoppel does not contravene any overriding public policy, **Johnson v. United States**, 576 F.2d 606.

At any rate, the **Jackson** court decided only that it had no jurisdiction *under the F.S.I.A.* to hear the case. It dismissed *on that grounds*, but Jackson could refile

at any time, citing Article III, Section 2 of the Constitution or 28 U.S.C. 1332(a)(2) or (3) as the basis for federal jurisdiction.

Respondent and the Eleventh Circuit believe that it amounts to retroactive application of law to apply the F.S.I.A. in these circumstances. But the legislative history (cited on pages 24 and 25 of of Petitioner's brief) clearly shows that the F.S.I.A. was intended to incorporate the existing law that District Courts already had diversity jurisdiction under 28 U.S.C. 1332(a)(2) and (3) in actions in which foreign states are parties, provided (as here) that the amount in controversy exceeded $10,000.

But even if the F.S.I.A. were the sole basis for jurisdiction (which it is not), and even if it were retroactive application of law (which it is not) to find F.S.I.A. jurisdiction, this cased meets the standards for retroctive application of law established by the Supreme Court in **Green v. United States**, 376 U.S. 149 (ironically, the same casae cited by the Eleventh Circuit as authority that jurisdiction should not be applied). That case allows retroactive application if such application was *either* the unequivocal terms of the legislation *or* the manifest intention of the legislators. The unequivocal terms of the F.S.I.A. state, using the most thoroughly encompassing words in the English language, that it applies to *any case* and to *all claims* . The legislative history states no fewer than seven time that the F.S.I.A. is designed to apply to *all cases* and that it is to be *comprehensive* and to *preempt* any other state or federal law. How can a work of "comprehensive" legislation be less than comprehensive? How can the words "all claims" and "all cases" support the idea that it should apply to only some cases?

III. Petitioner raised all issues, both Constitutional and stsatutory, before the Eleventh Circuit Court of Appeals.

Respondent argues that Petitioner should not be

permitted to raise the issues of Eminent Domain, Executive Powers and Seperation of Powers, and Due Process before the Supreme Court because, "these questions were not raised before the Eleventh Circuit." That argument is plain error; all these questions were raised by Petitioner before the Eleventh Circuit. For proof, one has only to read Petitioner's Petition to the eleventh Circuit. There, on page one, appear the following questions:

"1. Does the Constitution of the United States grant jurisdiction to the District Courts in civil controversies between a U.S. citizen and a foreign state? 2. Does the F.S.I.A. grant the District Courts jurisdiction over such cases involving events that took place before 1976? before 1952? 3. Did the foreign policy interests of the United States influence the panel in its decision not to find jurisdiction , and if so, does such a decision require just compensation to the bondholders under the eminent domain clause? 4. Did China enjoy absolute immunity from suit in the United States in 1911? 5. Did China renegotiate the Hukuang bonds, originally due in 1951, and extend their due date to 1976?" Then, on page 15 of that Petition, Petitioner wrote to the Eleventh Circuit the words, "...and any rights of the bondholders vesting exclusively for the 1952-1976 period cannot be dismissed by the judicial panel except by law." Thus, all these issues complained of by Respondent were raised in the court below.

Even if a Petitioner should fail to raise issues before the Court of Appeals, the Supreme Court should still take notice of plain error in the decisions of the appeals courts. As the Supreme Court noted in **Brotherhood of Carpenters v. U.S.**, 330 U.S. 395, 412, "The Supreme Court possesses power to notice 'plain error' though it is not assigned or specified." In **Pollard v. U.S.**, 352 U.S. 354, 359, the Supremre Court heard Pollard's Constitutional questions even though no question whatsoever was raised before the Court of Appeals. (in **Pollard**, as in the instant suit, Petitioner was *pro se*). Indeed, even in **Youakim v. Miller**, 425

U.S. 231, the authority cited by Respondent (where appellants failed to raise conflict between federal and state law at appeals court level), the Supreme Court wrote, "...appellants now wish to press the issue of conflict between state and federal law. We think it is appropriate to afford them the opportunity to do so, but that the claim should be aired first in the District Court. Vacating the judgement and remanding the case *for this purpose* will require the District Court to decide the statutory issue..." (emphasis added)

SUMMARY

Three questions of Constitutional law and an important question of statutory interpretation, not previously decided by this Court, are presented here. The statutory interpretation given by the Court of Appeals is in error and in conflict with decisions of the Supreme Court and with the decisions in other lower courts.

CONCLUSION

The writ should be granted. The Supreme Court should reverse and remand on the basis of the statutory issue-- the application of the F.S.I.A. to cases involving pre-1976 and pre-1952 events. Failing that, the Supreme Court should reverse and remand on the basis that the District Court has diversity jurisdiction under 28 U.S.C. 1332(a)(2). Failing that, the Supreme Court should find jurisdiction under Article III, Section 2 of the Consatitution. Failing that, the Supreme Court should find for Petitioner under the other Constitutional issues.

Respectfully submitted,

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